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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-183

REYNOLDS METALS COMPANY, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The resolution of this case involves considerably more than the mere construction of the particular language of Reynolds' most favored seller agreement. The decision below to deny Reynolds a cause of action under its most favored seller agreement rests ultimately on the decision's unwarranted and unprecedented application of the doctrine of sovereign action —an application both novel in scope and conflicting

in principle with the decisions defining the doctrine by this Court and by the Court of Claims itself.

The respondent has abandoned the holding of the Court of Claims that the most favored seller agreement was framed solely as an obligation of GSA. Its *Argument* recognizes that the agreement of GSA was an agreement of the United States and repeatedly refers to it as such. (Res. Br. 7-10).[1] Thus, the respondent's proposition, that in order for such an agreement of the United States to protect a contractor against breaches by the Government resulting from a judicial decision or an act of Congress the agreement must explicitly so state, is plainly in conflict with principles stated in decisions of this Court and the Court of Claims. If this proposition were valid with respect to most favored nation agreements, it would be equally valid with respect to virtually all Government contracts. This Court has, however, allowed recovery for breaches by the Government caused by Congressional action, even though the relevant agreements contained no such specific provision as that proposed by the respondent. *Perry* v. *United States,* 294 U.S. 330 (1935); *Lynch* v. *United States,* 292 U.S. 571 (1934). A court is no more sovereign than the Congress and *Perry* and *Lynch* are equally applicable to breaches arising from judicial action. See *Terteling* v. *United States,* 167 Ct. Cl. 331, 334 F.2d 250 (1964); *A.R.S. Inc.* v. *United States,* 157 Ct. Cl. 71 (1962).

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[1] Contemporary evidence shows that GSA regarded the agreement as "a Government commitment." (Attachment A to *Plaintiff's Objections to Motion for Summary Judgment and Plaintiff's Memorandum in Support of Its Objections* filed in the Court of Claims on June 8, 1970, which consists of a memorandum of P. W. Jordan of GSA relating to a meeting between representatives of GSA and representatives of Reynolds on June 24, 1957).

While the respondent tries to finesse the sovereign action theory of the court below by not discussing it, the court itself obviously considered that its theory was a necessary predicate to the elimination of the Government's obligation of equal treatment under the most favored seller agreement. The court below said that "The claim [of the petitioner] would be precisely the same if the most favored nation article had been omitted from Reynolds' contract, and that clause, rightly read, cannot serve . . . to sustain any independent demand." (Pet. App. 6a). Thus the court read the most favored nation agreement out of existence. In order to do so, however, it was necessary for the court to resort to its extraordinary and unprecedented application of the sovereign action doctrine. Even if a court decision in a contract case constituted sovereign action and even if such decision made performance impossible, which is not the case here, it has been repeatedly held that the defense of sovereign action does not relieve the Government from liability if it has agreed, as it did here, *either specifically or by implication,* to hold the other contracting party harmless from the action which it may take. *United States* v. *Bostwick,* 94 U.S. 53 (1877); *D & L Construction Co.* v. *United States,* 185 Ct. Cl. 736, 402 F.2d 990 (1968); *Saul Freedman* v. *United States,* 162 Ct. Cl. 390, 401-02, 320 F.2d 359, 365-66 (1963); *Gerhardt F. Meyne* v. *United States,* 110 Ct. Cl. 527, 76 F. Supp. 811 (1948).

If the decision below is allowed to stand and if the respondent has correctly interpreted its implications, the rights of contractors under innumerable existing contracts will be in jeopardy and major revisions in contract forms of the Government will be required in

order adequately to protect those with whom it contracts. Conceivably the Government's rights could be similarly jeopardized under clauses protecting it, for the doctrine of sovereign action has heretofore been applied impartially to the Government and private parties. Regardless of whether the respondent's interpretation is correct, the decision below constitutes such a distinct departure from previous decisions and its ramifications are so uncertain that, if the decision stands, it can be reasonably expected to give rise to extensive litigation.

Aside from the foregoing, the prospective importance of the decision, even with respect to most favored nation agreements alone, is far from minimal. The respondent relies upon a statement by General Services Administration that it has used similar "most favored seller" agreements on only two other occasions where the programs are not completed, and that no litigation involving those agreements is pending. While GSA may have used "most favored seller" agreements on only three occasions, these are not the only instances in which it has used "most favored nation" agreements, in a generic sense. In 1949, in connection with the aluminum plant disposal program, GSA used a "most favored purchaser" agreement. *Kaiser Aluminum & Chemical Corp.* v. *United States,* 152 Ct. Cl. 641, 692-93, 287 F.2d 890 (1961).[2] Fur-

[2] Most favored nation agreements used by GSA in connection with at least two completed programs, i.e., the aluminum plant disposal program and the aluminum expansion program, have been the subject of litigation. Based on this experience, there appears to be a reasonable probability that litigation will result from its two uncompleted programs and that the decision of the court below may become of immediate prospective importance in connection with these programs.

thermore, GSA is not the only department or agency of the Government which has utilized most favored nation agreements. For example, the United States used such an agreement in connection with the sale of electrical energy generated at Boulder Dam. *California Electric Power Co.* v. *United States,* 104 Ct. Cl. 289, 60 F. Supp. 344 (1945). Since the early days of the Republic most favored nation provisions have been included in treaties, some of which have been the subject of judicial consideration. See *Whitney* v. *Robertson,* 124 U.S. 190 (1888); *Bartram* v. *Robertson,* 122 U.S. 116 (1887); *Domestic Fuel Corp.* v. *United States,* 74 F.2d 769 (C.C.P.A. 1935); *United States* v. *Domestic Fuel Corp.,* 71 F.2d 424 (C.C.P.A. 1934).

In short, most favored nation provisions have been used in peace and in war to further the economic health and productive capacity of the country. Any decision which gives an unprecedentedly narrow application to a most favored nation agreement of the Government raises grave questions concerning the reliability of such agreements and seriously minimizes the utility of a contractual mechanism of proven and indispensable value in the furtherance of national programs for defense or economic advancement. The prospective importance of such agreements in this nuclear age, with the nation facing major undertakings in protecting the environment and in meeting national transportation and urban needs, can hardly be overstated.

The respondent's argument that the United States in the most favored seller agreement did not guarantee that Reynolds would wind up in the same economic position as other contractors, but agreed only to ac-

cord Reynolds the same terms and the "same administrative construction" of those terms that it accorded other contractors, is rank sophistry. The Court of Claims has found unequivocally that the intention of the parties expressed in the agreement was "that the defendant would follow a policy of uniformity of treatment in its dealings with various suppliers" and has held that "it is implicit in the most favored nation agreement that equality of treatment would not be destroyed by according different interpretations of the same contract provision to the three competitors." *Kaiser Aluminum & Chemical Corp.* v. *United States,* 181 Ct. Cl. 902, 388 F.2d 317 (1967) (Pet. App. 12a, 33a and 35a). In Judge Collins' words "This meant that any time one of the contractors received a benefit under its contract owing to an interpretation of the contract, regardless of the origin of the benefit, which was not extended to another contractor, the latter's most favored nation agreement was breached." (Pet. App. 10a, 11a). Thus, the limitations which the decision below attempts to read into the agreement are neither discernible from the terms of the agreement itself nor from the detailed findings with regard to the agreement contained in the court's earlier decisions and rulings as to its meaning. It is wrong to say, as the respondent does, that the opinion below "fully accords" with the plain terms of the agreement and the respondent cannot carry the burden of that argument, because any ambiguity in the agreement must be construed most strongly against the Government which drafted it. *United States* v. *Seckinger,* 397 U.S. 203 (1970).

Strong equitable considerations support the result Reynolds seeks in this case. The need for a uniform

method of reporting production and of computing additional production existed from the beginning. See *Kaiser Aluminum & Chemical Corp.* v. *United States*, 181 Ct. Cl. 902, 388 F.2d 317 (1967) (Pet. App. 12a, 19a-27a). Unlike Kaiser, and even the Government, Reynolds had a consistent position with regard to the problem. Unlike Kaiser, Reynolds completed production and sales on the basis which the Government finally adopted in its administrative interpretation of the supply contract clauses. Thus Reynolds concluded production deliveries on an amicable basis with the Government without litigation, but subject always to its reserved right to equal treatment. The Government had previously asked Reynolds to waive the protection of its agreement, but Reynolds had refused. The Government was fully cognizant of Reynolds' position and in fact sought to utilize that position in the defense of the suit which Kaiser brought against it. See concurring opinion of Chief Judge Cowen in *Kaiser Aluminum & Chemical Corp.* v. *United States*, 181 Ct. Cl. 902, 388 F.2d 317 (1967) (Pet. App. 55a, 56a-59a).

In the circumstances, the disparaging remarks of the court, which are adopted by the respondent, concerning Reynolds' failure to sue on the supply contracts are rank irony and are both unwarranted and unfair. They ignore the valuable cooperation the Government received by virtue of Reynolds' reliance on the protection of its most favored seller agreement in amicably completing production under the supply contracts. It was not incumbent upon Reynolds to join Kaiser in an attack on the Government's interpretation of the supply contracts, when Kaiser filed its suit in 1963. Reynolds' only proper concern at

that point was the protection of its competitive position in an industry in which competition had been fostered by the Government. The very purpose of the most favored seller agreement was to give it that protection.

The respondent's argument with regard to the statute of limitations is predicated wholly on the assumption that no breach of the most favored seller agreement occurred. Obviously, such an argument contributes nothing of value, because Reynolds' cause of action is founded upon a very real breach of that agreement by the Government.

On analysis, the respondent's arguments enhance rather than diminish the importance of this case which calls into question the credibility of the Federal Government's contractual engagements and impugns its business integrity. The petition should be granted to settle the important issues presented.

Respectfully submitted,

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July 1971